IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION	§	
MARK NEWBY, et al., Individually and On Behalf Of All Others Similarly Situated	§	Civil Action No. H-01-3624 And Consolidated Cases
vs.	§	
ENRON CORP., et al.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
v.	§	
KENNETH L. LAY, et al.	§	

MICHAEL C. ODOM'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS OF THE INDIVIDUAL ANDERSEN DEFENDANTS AND MICHAEL C. ODOM

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MICHAEL C. ODOM'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS OF THE INDIVIDUAL ANDERSEN DEFENDANTS AND MICHAEL C. ODOM

Michael C. Odom ("Odom") respectfully submits this reply memorandum in further support of his motion to dismiss the complaint pursuant to Fed. R. Civ. P. 9(b), Fed. R. Civ. P. 12(b)(6), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA").[1]

[1] Odom also incorporates by reference the arguments made in the "Reply Memorandum of the Individual Andersen Defendants In Further Support Of Their Motion To Dismiss Count I Of The Consolidated Complaint," dated June 24, 2002, as additional grounds for dismissal of the *Newby* complaint against him.

Preliminary Statement

The *Newby* plaintiffs attempt to assert a 10b-5 claim against Odom, an Arthur Andersen LLP ("Andersen") practice director, despite the complaint's complete failure to allege that Odom made any representation. Plaintiffs try to overcome this fatal defect by arguing that: (1) Andersen's audit reports should be deemed representations by each and every Andersen partner individually or (2) even without having made a representation, each of the Andersen defendants may be liable for allegedly participating in a "scheme to defraud." These arguments must be rejected, because the *Newby* plaintiffs' alleged harm arises from purported misrepresentations, and under Fed. R. Civ. P. 9(b), the PSLRA, and *Central Bank*, the plaintiffs cannot plead a primary violation of 10b-5 against Odom based on misrepresentations without alleging statements made by, and attributed to, Odom personally.

The only other claim against Odom is an alleged violation of Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), for "control person" liability. However, this claim cannot stand, because the complaint does not allege that Odom had any general day-to-day control over Andersen or control over the activities which give rise to plaintiffs' claims. Accordingly, the *Newby* complaint must be dismissed as to Odom.

Argument

Plaintiffs' 10b-5 Claim Must Be Dismissed As To Odom As An Improper Attempt To Assert Secondary Liability

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Supreme Court held that there is no private right of action against aiders and abettors under Rule 10b-5. The Supreme Court also made clear in *Central Bank* that a plaintiff cannot state a 10b-5 claim against a defendant for an alleged misrepresentation if the plaintiff did not rely upon a representation by that defendant. Because the *Newby* plaintiffs have failed to

allege that Odom personally made any representation, their 10b-5 claim against Odom cannot stand.

In their opposition brief, plaintiffs concede that Odom did not personally make a misrepresentation, yet claim that he and the rest of the Andersen defendants, as a group, share responsibility for Andersen's audit reports and Enron's earnings releases, because all the statements of Andersen, a partnership, are attributable to all of the partners (Pltfs. Mem. at 40). However, it is well settled that this type of "group pleading" does not satisfy Fed. R. Civ. P. 9(b) or the PSLRA, which require the plaintiffs to identify "the particular person who made the allegedly fraudulent representations." *Patel v. Holiday Hospitality Franchising, Inc.*, 172 F. Supp. 2d 821, 824 (N.D. Tex. 2001); *see also In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 902 n. 45 (S.D. Tex. 2001) (Harmon, J.) (the "group pleading doctrine" did not survive the PSLRA).[2] Because the complaint merely lumps Odom together with the other Andersen defendants, the 10b-5 count must be dismissed as to him. *Patel*, 172 F. Supp. 2d at 825 ("general allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another do not meet the requirements of Rule 9(b)" (internal quotations omitted)). Nor can plaintiffs overcome their failure to allege any misrepresentations by Odom by claiming that he had a duty to correct misrepresentations attributed to other defendants (Pltfs. Mem. at 43-45). *See Oran v. Stafford*, 226 F.3d 275, 286 (3d Cir. 2000) (where defendant made no prior statements, there was no duty to disclose or correct).

In addition, because the plaintiffs do not allege that Odom personally made any statement, *Central Bank* and its progeny also bar Rule 10b-5 liability as to him. Indeed, the

[2] The group pleading doctrine, which is no longer available, had "permit[ted] an inference of wrongdoing not based on defendant's conduct, but solely on defendant's status as an officer or director of a corporation." *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1350 (S.D. Cal. 1998).

weight of the case law requires that a statement actually be made by and publicly attributed to a defendant before a 10b-5 claim can proceed against that defendant. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996). There is no allegation – nor could there be – that either Andersen's audit reports or Enron's earnings releases were written by and attributable to Odom personally. Accordingly, Odom cannot be held liable for them under Rule 10b-5.

The *Newby* plaintiffs rely on a line of cases suggesting that defendants might be liable for statements they played a "significant role" in drafting, even if those statements were not made by or attributed directly to those defendants (Pltfs. Mem. at 41-43).[3] However, neither these cases nor plaintiffs' argument can be squared with *Central Bank*. In *Central Bank*, the Supreme Court held that a person could not be held liable under Rule 10b-5 for providing "substantial assistance" to the actor who made the misrepresentation. 511 U.S. at 168. There is no distinction between plaintiffs' proffered "significant role" test and the "substantial assistance" test already struck down by *Central Bank*. *See Anixter*, 77 F.3d at 1226 n.10 ("To the extent these cases allow liability to attach without requiring a representation to be made by defendant, and reformulate the 'substantial assistance' element of aiding and abetting liability into primary liability, they do not comport with *Central Bank of Denver*."). In any event, the *Newby* plaintiffs

[3] *See McNamara v. Bre-X Minerals Ltd.*, No. 5:97-CV-159, 2001 U.S. Dist. LEXIS 4571, *132 (E.D. Tex. Mar. 30, 2001) (looking to whether defendant played "significant role" in drafting false statements); *Young v. Nationwide Life Ins. Co.*, 2 F. Supp. 2d 914, 921(S.D. Tex. 1998) (while there is no aiding and abetting liability under Rule 10b-5, "it is not factually clear that [defendant] did not have a more substantial role in the alleged misrepresentations"); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 970 (anyone "intricately involved" in creation of false statements should be liable under Rule 10b-5) (C.D. Cal. 1994). However, in some of the cases upon which the plaintiffs rely, the language regarding "substantial participation" or "intricate involvement" being enough for primary liability is dicta, because the alleged misstatements at issue were actually attributed by name to the defendants. *See Howard v. Everex Sys., Inc.* , 228 F.3d 1057, 1061 (9th Cir. 2000) (defendant signed financial statements, but did not draft them); *In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (complained-of letter stated that it "was prepared after extensive review and discussions with . . . [auditor]" and referred the addressee to two of the auditor's partners for further information).

do not allege that Odom personally played *any* role in drafting Enron's earnings releases or Andersen's audit reports, much less a "significant role."

Plaintiffs fare no better with their alternate argument that, even though Odom made no representation upon which the plaintiffs relied, he may still be liable under 10b-5 for his alleged participation in a "scheme of defraud" (Pltfs. Mem. at 33-41). This is just another way of claiming that Odom aided and abetted an alleged securities fraud. *See Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms used throughout the complaint all fall within the prohibitive bar of *Central Bank.*"); *In re HI/FN, Inc. Sec. Litig.*, No. C 99-4531 SI, 2000 U.S. Dist. LEXIS 11631, *35 (N.D. Cal. Aug. 9, 2000) ("allegations of a scheme to defraud by individual defendants who are not alleged to have made statements do not support a claim for violation of § 10(b)").

Of course, courts have recognized liability in cases not involving misrepresentations where the defendants engaged in a scheme to defraud or employed a deceptive device, such as engaging in insider trading or converting a customer's securities. *See, e.g., S.E.C. v. Zandford*, ___ U.S. ___, 122 S. Ct. 1899 (2002) (broker's conversion of securities in his customer's account); *United States v. O'Hagan*, 521 U.S. 642 (1997) (insider trading); *BMC Software, Inc.*, 183 F. Supp. 2d at 869 n.18 (recognizing that insider trading can violate Rule 10b-5 without the defendant's having made a misstatement or omission); *In re Waste Mgmt. Sec. Litig.*, Civ. No. H-99-2183, slip op. at 75 (S.D. Tex. Aug. 16, 2001) (Harmon, J.) (same); *In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, No. H-99-1948, slip op. at 9 n.12 (S.D. Tex. Feb. 20, 2001) (Harmon, J.) (same).

Here, however, the means through which the plaintiffs claim to have been harmed is not some sort of trading activity or misappropriation, but rather reliance upon alleged material misstatements in financial statements, audit reports, and earnings releases. And, the only

"scheme" plaintiffs have alleged is one purportedly designed for the specific purpose of making misrepresentations regarding Enron's financial condition (Pltfs. Mem. at 4-22). Thus, because plaintiffs' whole lawsuit is based on allegedly fraudulent misrepresentations rather than upon a non-representation-based scheme or "deceptive device," in order for the liability to be primary rather than secondary, the alleged violator must have personally made a misstatement or omission. *See Anixter*, 77 F.3d at 1226 ("[r]eading the language of § 10(b) and 10b-5 through the lens of *Central Bank of Denver*, we conclude that in order for accountants to 'use or deploy' a 'deception' actionable under the antifraud law, they must themselves make a false or misleading statement (or omission)"); *Copland v. Grumet*, 88 F. Supp. 2d 326, 332 (D.N.J. 1999) (defendants' alleged participation in "process of 'cooking the books'" and generating allegedly fraudulent financial data "cannot be considered the equivalent of *making* the false statements themselves").

Vosgerichian v. Commodore International, 862 F. Supp. 1371 (E.D. Pa. 1994) is instructive. There, investors alleged Rule 10b-5 liability against Andersen for: (1) its advice, consultation, and assistance to the defendant company in accounting for a transaction in an allegedly misleading manner; and (2) issuing a "clean" audit report when the financial statements allegedly did not comply with GAAP. *Id.* at 1378. The court held that, while Andersen could be sued as a primary violator for the alleged misstatements in its "clean" audit report, the plaintiff's other claim was barred by *Central Bank*, because assisting a company in accounting for a transaction did not establish primary liability. *See id.* The court reasoned:

> [Plaintiff] further states "AA provided direct and substantial assistance to [the company] in misrepresenting the true nature of the Prudential transactions." Plaintiff has not alleged facts in connection with the Prudential warrant transaction sufficient to support a primary liability claim under section 10(b) or rule 10b-5 against AA. Each and every misrepresentation alleged was made by [the company]. Plaintiff's allegations against AA do not go

> beyond allegations that AA assisted [the company] in perpetrating securities fraud and are thus not cognizable.

Id. (citation omitted). Likewise, allegations concerning Odom's alleged participation in accounting for the Raptors amount, at best, to an aiding and abetting claim. *See Mishkin v. Ageloff*, No. 97 Civ. 2690 (LAP), 1998 WL 651065, *16 (S.D.N.Y. Sept. 23, 1998) ("orchestration" of misstatements not enough for primary liability); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 n.1 (D. Mass. 1994) (accounting firm's participation in "structuring" of transactions was not sufficient to state primary liability, because it did not equate to making a misrepresentation).

In sum, a plaintiff cannot circumvent the prohibition on aider and abettor liability by claiming "scheme" in what is a misrepresentation case. At most, the allegations against Odom, who made no representation, amount to nothing more than an assertion that he aided and abetted others who made misrepresentations. He is not and cannot be liable for this conduct, and the plaintiffs cannot change that result, mandated by *Central Bank*, by attempting to recharacterize this misrepresentation case as a "scheme" case.

Plaintiffs' Section 20(a) Claim Also Must Be Dismissed As Against Odom

Section 20(a) provides for joint and several liability for "[e]very person who, directly or indirectly, controls any person liable under any provision of this title." 15 U.S.C. § 78t(a). The SEC has defined "control" as:

> the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.

17 C.F.R. § 230.405. To plead control person liability, the complaint must allege facts which demonstrate that the defendant had the power to influence and control the day-to-day activities and policies of the primary violator generally, *and* the specific conduct which resulted in the

underlying claim. *See Brown v. Enstar Group*, 84 F.3d 393, 397 (11th Cir. 1996); *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619-20 (5th Cir. 1993).

Here, plaintiffs have not alleged a standard "control person" claim, which typically names one or two executive officers and/or directors who signed the financial statements. Instead, they indiscriminately name Odom, an Andersen regional practice director, along with *17* other Andersen partners, ranging from partners on the Enron engagement team, to partners in Andersen's Professional Standards Group, to partners in administrative supervisory roles, to in-house legal counsel (Pltfs. Mem. at 62-67). Apparently realizing that they have failed to allege primary liability under Rule 10b-5, the plaintiffs next attempt to avoid *Central Bank* by claiming that any Andersen partner who was ever consulted about or "involved in" an issue regarding Enron was a "control person" under Section 20(a). Notably, plaintiffs cite no cases to support this novel theory, which should be rejected out-of-hand.

As to Odom, the allegations are limited to the following:

> Michael Odom served as the audit practice director for Andersen's Gulf Coast Market Circle, played an integral part in the Enron audit, and helped to remove Carl Bass from his oversight position. ¶93(k). Odom attended the 2/5/01 meeting, wherein he and other Andersen partners agreed to retain Enron as a client and issue a clean audit opinion for 00, despite identifying numerous accounting irregularities by Enron. ¶¶930-931. Testimony and e-mail reveal that Odom was deeply involved in accounting for the Raptor transactions and knew that Bass, as well as other members of the PSG, thought Enron's accounting for the Raptors was deceptive. ¶952; 5/28/02 Trial Tr. At 4726:2-10; Odom Deposition Tr. at 71:2-8. And Odom was instrumental in instructing Duncan to "comply" with Andersen's purported document retention plan. ¶966.

(Pltfs. Mem. at 64). These allegations are patently insufficient to support a claim that Odom had the power to direct the management and policies of Andersen generally or over the specific conduct underlying the plaintiffs' claims. *See Howard v. Everex*, 228 F.3d 1057, 1067 (9th Cir. 2000) (that defendant served as a director was insufficient to show requisite "actual authority

over the preparation of the financial statements necessary to find him a control person"). Indeed, by alleging that Odom was the Gulf Coast Market Circle Practice Director, plaintiffs implicitly concede that he was not in a national or company-wide position of authority and did not serve as any sort of managing partner. *See Abbott*, 2 F.3d at 620-21 (defendants were not "control persons" because no showing they controlled company as whole); *Winkler v. NRD Min., Ltd.*, 198 F.R.D. 355, 365 (E.D.N.Y. 2000) ("involvement in" wording of press release "falls short of proof that [defendant] was a 'controlling person' in the upper level management").

In short, the *Newby* plaintiffs' Section 20(a) claim against Odom must be dismissed, because they have not alleged that he controlled Andersen day-to-day or had control of the conduct underlying the *Newby* complaint.

Conclusion

For the reasons stated above, the complaint should be dismissed in its entirety as to Odom.

Signed this 24th day of June, 2002

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 24th day of June, 2002, a true and correct copy of the foregoing instrument was served on all counsel in accordance with the court's order regarding service.

Billy Shepherd